

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]

And

Department of State

Record of Proceedings

FSGB No. 2007-004

Date: August 13, 2007

**ORDER: MOTION TO REVOKE
INTERIM RELIEF AND MOTION
TO DISMISS
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Harriet E. Davidson

Board Members:

Alfred O. Haynes
Theodore Horoschak

Special Assistant:

Joseph Pastic

Representatives for the Grievant:

Bridget R. Mugane, P.C.

Representative for the Department:

Joanne M. Lishman
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO REVOKE INTERIM RELIEF AND MOTION TO DISMISS

HELD: Department's Motion to Dismiss is denied. Grievant's resignation does not render the appeal moot as he requested reinstatement, a meaningful remedy which the Board has the authority to grant if the grievance is found meritorious. Grievant's unopposed Motion to Withdraw Interim Relief is granted.

I. BACKGROUND

[Grievant] is a tenured FS-03 Special Agent in the Bureau of Diplomatic Security (DS), Department of State (Department or agency). On June 16, [Year #1], he filed a grievance with the Department asserting that both the [Year #2] and [Year #3] Selection Boards (SB) violated their Precepts by relying on Employee Evaluation Reports (EERs) from only one rater when they low-ranked him. The low-ranking by the [Year #2] and [Year #3] SBs resulted in [Grievant]'s automatic referral to the [Year #3] Performance Standards Board (PSB), which designated him for separation.

For relief, he requested:

- Rescission of the [Year #2] and [Year #3] low-rankings, the [Year #3] automatic referral to the PSB, and the PSB selection out decision;
- Cleansing of all personnel records reflecting these improper actions.
- Attorney Fees and costs; and,
- Such other relief as deemed just and proper.

In its February 22, [Year #4] decision letter, the Department denied the grievance in its entirety. [Grievant], through counsel, filed an appeal with this Board on March 5 wherein he requested interim relief (IR) from separation pending resolution of his appeal. As the Department did not object to grievant's request, IR was granted by the Board on March 9.

On April 21, grievant filed a motion seeking to revoke the previously granted IR on the grounds that he had submitted his resignation -- effective April 29, [Year #4] -- to accept “an appropriate professional position at another federal agency.” In his March 28, [Year #4] resignation letter to the Department, [Grievant] reserved the right to continue to pursue his appeal, stating:

I hearby [sic] resign from my employment as a Special Agent in the Bureau of Diplomatic Security, Department of State, effective April 29, [Year #4]. I do so to take other employment. However, in doing so, I reserve the right to continue with my Foreign Service grievance and the administrative proceedings before the Foreign Service Grievance Board.

The Department did not respond to the grievant’s motion. Instead, on May 14, the agency filed a motion seeking to have the appeal dismissed as moot,¹ arguing that the remedies [Grievant] sought are appropriate only for a current member of the Foreign Service. Grievant submitted his opposition to the agency’s Motion to Dismiss that same day. In addition to his legal argument, grievant expressly added to his requested remedies reinstatement with back pay and all benefits. On May 17, he filed an amendment to his opposition citing additional Board precedent in support of his position.

II. POSITIONS OF THE PARTIES

THE AGENCY

Motion to Revoke Interim Relief

The Department did not address grievant’s Motion to Revoke Interim Relief.

Motion to Dismiss

The remedies that [Grievant] is seeking in his grievance are suitable only for a current member of the Foreign Service. Grievant’s resignation makes his grievance moot because “any attempt to provide relief in such circumstances would not be meaningful, a

¹ The Board notes that the Department did not raise any jurisdictional objections in its Motion to Dismiss.

criterion for mootness”, citing FSGB Case No. 2004-49 (Order dated December 21, 2004) and FSGB Case No. 97-108 (Decision dated October 30, 1998).

The Department further notes that under Section 604 of the Foreign Service Act, “the performance file is confidential and is not transferred to any other agency.” In addition, no information from the performance file may be released to any prospective private sector employers without the employee’s written permission.

GRIEVANT

Motion to Revoke Interim Relief

Grievant resigned to accept a position at another federal agency that allows him “to gain more experience and further build his professional skills as well as to provide onward employment if need be.” Grievant’s resignation letter preserved his right to pursue his grievance. His resignation does not affect the grievance and he should be allowed to withdraw his request for interim relief, citing FSGB Case No. 95-18 (Order dated May 31, 1995).

Motion to Dismiss

There is no merit to the Department’s argument that his resignation rendered this appeal moot. He states that the remedy requested in his initial grievance was a rescission of the pending selection out, not a removal or redaction of any performance appraisals. In his opposition to the Department’s motion, he expressly added to his initial remedies reinstatement with back pay and all benefits.

The Department’s reliance on the two cited Board precedents (FSGB Case Nos. 2004-49² and 97-108) with respect to mootness is misplaced. In resigning, the grievant in

² Grievant, in his opposition to the motion to dismiss, erroneously cites the current case number in lieu of the FSGB case cited by the Department – FSGB 2004-49.

FSGB Case No. 2004-49 did not reserve the right to continue her appeal nor was reinstatement requested. The Board found that under those circumstances, had the grievant prevailed there would have been no practical effect and the appeal was thus rendered moot. Similarly, in FSGB Case No. 97-108, the grievant did not expressly reserve the right to continue the grievance nor did he request reinstatement. As the appraisal being challenged in that instance “would not follow him in his future employment, the grievance was held to be moot.”

[Grievant]’s situation is analogous to FSGB Case No. 95-18 (Order dated May 31, 1995) in which the grievant, in requesting that interim relief be revoked, expressly reserved the right to pursue her grievance and requested reinstatement if she should prevail. The grievant prevailed and among the remedies awarded was reinstatement. Also supportive of his position is FSGB Case No. 2002-40 (Decision dated May 28, 2003) in which the Board retained jurisdiction over a grievance filed by a career candidate who resigned to take other employment but requested reinstatement. That grievant also prevailed on the merits and the Board directed his reinstatement.

III. DISCUSSION AND FINDINGS

The grievant filed a Motion to Revoke Interim Relief and the Department filed a cross Motion to Dismiss the grievance as moot. We address these motions separately in the order in which they were presented to the Board.

Motion to Revoke Interim Relief

22 U.S.C. Section 4136 (8)³ provides in relevant part that:

If the Board determines that the Department is considering the involuntary separation of the grievant (other than an involuntary separation for cause under section 610(a) [22 USCS § 4010(a)]) . . . which is related to a

³ Section 1106(8) of the Foreign Service Act of 1980 as amended

grievance pending before the Board and that such action should be suspended, the Department shall suspend such action. . . .

As the Board noted in FSGB Case No. 95-18 (Order dated May 31, 1995), in the absence of special circumstances, this Board customarily grants requests by tenured employees for a stay of the separation under challenge pending its determination on the merits of the grievance. This relief is granted in the judgment that, even if the grievant is ultimately reinstated with retroactive benefits, a hiatus in the grievant's employment record may have adverse and irremediable career consequences.

[Grievant] seeks to withdraw his request for IR due to his resignation from the Department in order to accept other federal employment. The Department has provided no argument contesting grievant's request. Grievant's reasons for requesting revocation of IR seem appropriate under the circumstances. We find no reason to continue our directive granting IR nor can we ascertain any prejudice to the agency arising from its revocation. Revocation of interim relief does not in any way affect [Grievant]'s appeal, which will proceed according to the rules of the Board. See FSGB Case No. 95-18, *supra*. Grievant's motion to revoke IR is granted.

Motion to Dismiss

The Department does not challenge the Board's jurisdiction in this matter as grievant was a member of the Service when he filed both his agency level grievance and appeal with the Board. His subsequent resignation does not affect the status of that appeal. As the Board stated in FSGB Case No. 94-59 (Decision dated February 16, 1996)⁴:

There is nothing in Section 1104 that states or implies that the employee must remain employed or must seek interim relief . . . to retain status before the Board.

⁴ See also FSGB Case Nos. 95-18 (Order dated April 26, 1996) and FSGB 2002-40 (Decision dated May 28, 2003).

Given grievant's resignation, the Department argues that the appeal is now moot as the remedies sought are appropriate only for a current member of the Foreign Service. As stated in FSGB Case No. 2005-002 (Decision dated June 29, 2005), "[t]he Board has normally adhered to the standard of whether the attempt to provide any relief in a case would be 'meaningful' as a criterion for mootness," citing FSGB Case Nos. 2004-49 (Order dated December 21, 2004) and FSGB Case No. 97-108 (Decision dated October 30, 1998). "This determination often revolves around the question of whether a decision on the merits would affect the former employee's status." *Id at p. 11*.

FSGB Cases No. 2004-49 and 97-108, *supra*, cited by the Department are inapposite. The grievants in those cases sought expunction of certain materials from their official personnel files (OPF). Although they had resigned from the Service during the pendency of their appeals, neither grievant reserved the right to pursue his or her grievance and neither sought reinstatement. Under those circumstances, any attempt to provide relief would not have been meaningful, as a former member's OPF is confidential and would not have been transferred to another agency or released to private employers without permission. The Board in FSGB Case No. 97-108, *supra*, specifically noted that the grievant had not requested reinstatement and implied that this was a consideration in its determination that the case was moot.

In FSGB Case No. 95-18 (Decision dated April 26, 1996) cited by [Grievant], the grievant requested that the Board revoke its previous order granting IR so that he could accept an "out-of-agency" appointment. The Department argued that the grievant's relinquishment of prescriptive relief rendered his separation voluntary; thus, he was not entitled to reinstatement and other requested relief. In its decision, the Board emphasized

that the grievant had requested reinstatement as part of his requested relief and allowed the case to proceed to a decision on the merits. Similarly, in FSGB Case No. 2002-40, *supra*, the grievant requested rescission of the Board's grant of IR to take other employment. That grievant later revised his remedies to include reinstatement with back pay. The Board retained jurisdiction over that appeal as well. In both of these cases, the Board determined that, should the grievant prevail on the merits, a meaningful remedy could be provided.

In his grievance to the Department and his appeal before the Board, [Grievant] included among his remedies rescission of both the low-rankings and the PSB's decision to separate him. Further, he requested such other relief as deemed just and proper. This phrase contemplated reinstatement if grievant were to be separated from the Service. By reserving his right to pursue his appeal in his resignation letter, [Grievant] clearly sought to address the harm: the proposed involuntary separation arising from the alleged procedural errors in his low-rankings. And his May 14, { Year #4} opposition to the agency's Motion to Dismiss wherein he "expressly adds to his requested remedies, reinstatement with pack pay and all benefits" removes any ambiguity as to his desires to be reinstated.

22 U.S.C. Section 4137(b)(4)⁵ provides this Board with the authority to direct the Department to reinstate a grievant if a grievance is found meritorious. Retention of jurisdiction in this instance will permit the Board to decide the matter on its merits. Should [Grievant] prevail, this Board has the authority to provide a remedy that would be meaningful – reinstatement. The agency's Motion to Dismiss is denied.

⁵ Section 1107(b)(4) of the Foreign Service Act of 1980 as amended

IV. ORDER

1. Grievant's Motion to Revoke Interim Relief is granted. The interim relief granted in the Board's acknowledgement letter of March 9, [Year #4]⁶ is revoked.
2. The Department's Motion to Dismiss is denied.
3. Any supplemental statement from grievant will be due 30 days from the date of receipt of this Order, as our Grievance Time Guidelines apply to the processing of this matter.

⁶ The relevant language reads: "Therefore, Interim Relief is granted for a period of one year, to March 5, [Year #5], or until a decision is reached – whichever comes first."